RECORD TITLE TO LAND.

THERE has been a growing interest of recent years in the question of greater certainty and simplification in land titles. Various projects of improvement are before the public. There has been in some parts of the country a great improvement in registry systems, particularly in the matter of indexes. Strong efforts have been made for the introduction of a block system of indexing, designed to reduce to a minimum the number of conveyances to be examined to discover those which pertain to a given parcel of land. Statutes have been passed facilitating the removal of certain classes of clouds upon titles, as, for example, old mortgages, alleged to be satisfied, but not discharged of record. It has recently been proposed, in more than one State, to carry out to their logical results the principles involved in all such legislation, and to introduce a full and complete system of establishment of titles, which shall settle, as against all the world, up to a given date, the title of a given parcel of land, and thenceforth keep it constantly posted up, so that it may be at all times certain and known, — as far as certainty is possible, — and be passed without expense or delay. The practicability of such a plan has been fully demonstrated in the British colony which has given many of our States their present voting system. The advisability of legislation by us in this direction is likely to be more and more discussed in the next few years.

For a full understanding of the merits of any scheme which may be proposed, whether partial or general, it is essential to have clearly before the mind the difficulties of the existing system.

Although a system of registration of deeds prevails to a certain extent in England, title is commonly passed there by a mere delivery of deeds. A system of registration of deeds universally prevails throughout this country; and has prevailed, in the older States, from the very earliest days, substantially in its present form. This difference between the American system and the system generally prevailing in England is so apparent and striking that we are accustomed to consider it as radical. There is a widespread popular conviction that our land titles are "record titles," in the sense that they may be ascertained by an examination of

records. The fact is, that there is no such thing, even in this country, as a "record title," in the proper sense of those words. No title can be ascertained by the records of the registry of deeds, or other records practically accessible, or, indeed, by any records. A title depends, not only upon the deeds and other writings appearing of record, but also upon a great number of facts nowhere appearing of record. It is proposed in this article to call attention to some of these non-record elements of so-called "record titles."

1. The registry of deeds affords no means of verifying the genuineness of signatures, either of the grantors in deeds, or of the magistrates who, under the prevailing American system, take acknowledgments of signatures. In Massachusetts there are thousands of justices of the peace, all with power to take acknowledgments of deeds. A title will often depend upon the genuineness and proper authentication of ten, twenty, or thirty deeds. Each deed purports to have been acknowledged before a magistrate, ordinarily before a justice of the peace. Whether the person of that name was a justice of the peace, may be ascertained at the State House; but whether it was he or some other person of the same name who signed, and whether the signature was genuine or not, there are no means of ascertaining. Among the number of justices of the peace in Boston is one R—— S——; but the Boston directory shows eight persons of that name, and there is no way of proving by the record in the registry of deeds that the R—— S—— who signed a given certificate of acknowledgment is the same R—— S—— who is a justice of the peace. It is perfectly easy, owing to the lack of means of ascertaining the genuineness of signatures, to perpetrate the grossest frauds upon the most careful purchasers; and gross frauds have within recent years been so perpetrated.

2. The title to almost every parcel of land must turn at some stage of its history upon the question of heirship. An owner dies intestate; very possibly no administration is taken out upon his personal estate, and even if it is, the record recitals and the decrees with reference to the question of who are his next of kin are not necessarily conclusive with regard to the heirs' title to the real estate. A subsequent purchaser must, at his own peril, ascertain for himself who were the heirs; and not infrequently, especially after a considerable lapse of time, this is a matter of great difficulty. Occasionally it is impossible, particularly in the case of a person of foreign birth leaving no issue, to ascertain with any

degree of assurance whether those who claim to be his heirs are such, or are all the heirs. A question of this character, once arising in a title, becomes a more and more difficult and dangerous question as time goes on; and under the various exceptions which prevail in many of the States in the statutes of limitations, such a defect may not be cured even by a great lapse of time.

3. The fact that a deed appears of record is only *prima facie* proof that it ever became operative by delivery. If I execute and acknowledge a deed, but do not deliver it, and if, without negligence on my part, it is stolen from me by the grantee, or, to take a more likely case, is by mistake, and without authority, delivered to him by one who holds it in escrow, it passes no title; and the fact of its being recorded does not help it. The Massachusetts Legislature of 1892, to meet this difficulty, passed an Act providing that the record of a deed, lease, power of attorney, or other instrument duly acknowledged or proved in the manner provided by law, and purporting to affect the title to lands, shall be conclusive evidence of the delivery of such instrument in favor of purchasers for value, without notice, claiming thereunder. This Act throws upon one who has executed a deed the responsibility of keeping it in his own hands until delivery, at his peril.

4. Record statutes ordinarily allow an unrecorded deed to be effectual as against persons having notice of it. A recorded deed is therefore always open to a possible attack upon the ground that there is a prior, unrecorded deed; that he who took the later deed took with notice of the prior; and that subsequent purchasers, if any, also had notice. It is a matter of surprise that fraudulent ingenuity has not more often resorted to this comparatively easy field.

5. Questions of incapacity to contract, as by insanity or infancy, are not determined by the record of a deed. One who takes what is called "a good record title" assumes, at his peril, the mental capacity and the full age of all the successive grantors in his chain of title for a long way back. Instances are not lacking in which a *bona fide* purchaser has lost his title by the establishment of unsoundness of mind or infancy on the part of a prior owner of the land.

6. Questions of marriage and divorce enter very largely into title. In most of the States the fact of marriage is, in a certain sense, a fact of record; but marriage records are ordinarily made according to the city or town of the residence of one or both of the parties, or the place where the marriage is solemnized; and

people move about so much that some of the grantors in a given chain of title are almost sure to have been married in some State other than that where the land lies, and perhaps in a remote State, and in a locality not easily to be ascertained or reached at the time when the title is being examined. It is not ordinarily practicable, in examining a title, and in the limited time which can commonly be allowed, to attempt to trace the records of all the various marriages which affect the title. The question of divorce is still more difficult. The total number of divorces within the past twenty years has been enormous, and the question of the validity of a given divorce, as freeing a certain parcel of land from inchoate dower or curtesy, or as fixing heirship, may be a vital factor in any title. All that a conveyancer can ordinarily expect to ascertain, and all that he ascertains from the record in the registry of deeds, is that a given grantor claimed to be married or unmarried, or to have been married to A or B. The conveyancer cannot know, if such be the case, as it often must be, that the supposed marriage, or absence of marriage, is based upon a divorce invalid by reason of lack of jurisdiction or other defect in a divorce suit.

7. A vast number of estates, particularly in the older parts of the country, are affected by incumbrances, or even complete change of title, effected by prescription or adverse possession. Prescription and adverse possession do not appear of record; and yet they may burden a title, or entirely extinguish a title apparently good of record.

8. In the new States lands are commonly described with almost mathematical exactness, by reference to public surveys and plats. In the older States this is commonly not the case; estates often have irregular and arbitrary outlines, and the boundaries are fixed by trees or other natural monuments, by the lands of adjoining proprietors, or by stakes and stones. It is often a matter of the greatest difficulty to ascertain what particular pine-tree is the one referred to, or where a certain pine-tree stood fifty years ago. In such of the old towns as retain a considerable proportion of the original stock, there are old men whose habits of mind, occupation, or natural tastes have made them the repositories of tradition upon this head, and frequently by their aid alone can the monuments and boundary lines of woodland and other country lands (perhaps suddenly risen into value) be settled. In the case of flats this difficulty is very marked. Some of the most intricate questions of fact litigated within recent years in Massachusetts have turned

upon the line of ancient watercourses or the line of original upland. In many cases the original line of upland has been changed, either by natural processes or by filling, and in the case of flats, under the laws generally prevailing, there often arises, not merely the question of ownership of upland, but also the question of the right to fill, or to wharf, out to a harbor line. The question of whether a valuable wharf or filling privilege in a great city is in A or B may turn upon the question whether or not A's predecessor in title, sixty years before, in selling upland to B's predecessor in title, withheld a hand's breadth of upland. A case has recently been before the Board of Harbor and Land Commissioners of Massachusetts, in which the question of title to a valuable wharf turned purely upon possession. Prior to May 27, 1867, a twenty-years statute of limitations ran against the State in respect of lands below high-water mark. Certain persons, with their predecessors in title, had from the early part of this century occupied and used a certain wharf, and the dock alongside of it. Repeated sales and mortgages had been made. A sale having been negotiated in the past year, the question of title arose. The vendors could show no record title; they had therefore to fall back upon a title by prescription or by the effect of the statute of limitations. To this end it was essential to them to show an exclusive possession by themselves and their predecessors, under claim of right, to the wharf, to its present extent, during a continuous period of not less than twenty years prior to May 27, 1867. No witnesses could be found whose memory upon the point went back to 1847. An official plan made by State officers shortly before 1847 indicated that at that date no wharf of the extent in question was standing. Fortunately, however, for the vendors, a careful search disclosed plans of 1845 and 1846, which, being reduced to a common scale and compared with each other and with natural monuments, clearly indicated the existence, May 27, 1847, of a wharf of the required extent. The presumption of continuous use for a few years after that, with actual testimony of use for the remaining period of time, completed the title. But for the purely accidental facts that these later plans were made when they were made, instead of a year or two later, the vendors would very likely not have been able to show title; and yet they had in fact a perfectly good title.

9. Many titles hinge at some point in their history upon the validity and operativeness of a conveyance by a corporation which

has previously owned the land. A deed from such a corporation, we will say, appears upon the record; it purports to have been executed in behalf of the corporation by its president or its treasurer, and to have been acknowledged by him. Whether he had authority to execute, deliver, and acknowledge such deed is a question of fact entirely outside the record of the registry of deeds, and turns upon facts appearing of record only in the record book of the corporation. To find that record book, particularly if the corporation be a religious society and not a business corporation, it is usually necessary to hunt up the clerk of the parish at his residence, wherever he may happen to live; and even if the record in his hands appears to be sufficient, the purchaser has not the evidence in his own hands, but is dependent upon the care which may be taken of the record book by the clerk and his successors. The reports which have been published within the last few years by a Commissioner of the State of Massachusetts upon the records of parishes, towns, and counties show the extreme peril to titles from this source. Corporation record books have been kept with very little care, and have frequently been destroyed, lost, or accidentally burned. A question recently arose in a title as to the right of control, and incidentally thereto as to the actual membership, of Theodore Parker's old parish in West Roxbury. These questions turned entirely upon records of the parish; but the parish record book had been recently burned in a fire which consumed the clerk's house. In order to make a satisfactory title it was necessary to get an Act of the Legislature rehabilitating the parish, and reciting in detail the names of the persons ascertained and determined by the Legislature to be members of it.

10. Many titles turn at some point of their course upon devise. A man dies, his will is probated, or he is adjudged intestate, and those who appear to be his devisees or heirs, sell. In most of the States, and in Massachusetts, except as far as the rule is there modified by a very recent statute, purchasers of such real estate buy at their own peril, and take the risk of a will, or an earlier will, being found and probated, even at a very remote period of time. In a case recently decided in Massachusetts, a title of nearly sixty years standing was overturned by the accidental discovery, nearly sixty years after the testator's death, of a will until that time unknown. It is now by a recent Massachusetts statute provided that after a lapse of two years from the probate of a will

or a judicial determination of intestacy, purchasers for value without notice shall take an absolute title, notwithstanding the subsequent probate of a will.

11. One element in the course of a title is very likely to be the foreclosure of a power of sale mortgage, and in many of the States, as, for example, in Massachusetts, there are no judicial proceedings in such foreclosure. A purchaser, therefore, under a foreclosure title takes the title at his peril. He runs the risk of several facts which nowhere conclusively appear of record, none of which are evidenced of record, otherwise than by an affidavit of the mortgagee, which may be false, or may be mistaken, and is open to rebuttal by oral evidence. He takes the risk, for instance, of there having been an actual mortgage debt existing at the time of the foreclosure, or of the mortgage debt having been actually overdue. A mortgage may be apparently good, but in fact the mortgage debt may have been duly paid off, at maturity, without a record discharge. A mortgagee's sale, upon such a state of the record, would convey an apparently good title; and yet the purchaser would have no title at all. Even eliminating cases of deliberate perjury and fraud on the part of a mortgagee, there may well be a question of law as to whether there is or is not an existing mortgage debt. The mortgagor may claim that the debt has been satisfied by operation of law. The mortgagee may dispute this, and may honestly make his affidavit that the debt was due. In such case, the purchaser, if the debt had in fact been extinguished, would take no title.

12. Not infrequently there enters into a title the question of the validity of a partition. Certain judicial proceedings for partition among heirs, to have any validity, must embrace all the lands held by them in common and under the same title and lying in one county. An omission of one parcel so held invalidates the proceedings, at least as against a person who does not actually appear and take part in it. The question of whether certain lands are in fact all the lands left by a given testator or intestate and owned in common by his heirs or devisees within the county, is a question of fact, and one upon which heirs or devisees are not unlikely to make a mistake. It frequently happens, in the country, that a man owns a great number of separate tracts of woodland, and that he does not know, as matter of memory, and that his heirs and devisees fail to ascertain, the full extent of his ownership. A title has quite recently come within the knowledge of the writer,

which was invalidated by reason of the omission, in a judicial partition, of a small parcel of land probably not known to the parties.

13. The practice of creating upon lands those equitable easements or burdens which we call restrictions has become more and more common. It is very unusual in a deed creating restrictions to state in behalf of what particular lands, whether of the grantor or others, the restrictions are to operate. It appears to be the law that one who owns land may convey a parcel of it with restrictions which will operate, not only in favor of his own remaining land, but in favor of his neighbors' lands, by way of a voluntary gift or donation from him to them, and that without their even knowing or consciously accepting the benefit. It very frequently happens, particularly in a case of the division of land into building lots, that it is a matter of great difficulty to ascertain, — and a matter to be settled entirely by oral evidence as to the situation of the lands and the intent of the parties, — to what lands a given restriction enures, and what lands, therefore, must release it, if it is to be released.

14. It frequently happens that the validity of a title turns upon the effect or operation of a judgment, — serving perhaps as the basis of an execution sale. The validity of this judgment may turn upon intricate questions of constitutional law. A recent judgment in Massachusetts was in pursuance of the express language of a Massachusetts statute, and yet was held to be invalid, upon the ground that the statute was unconstitutional. A judgment may be invalidated by reason of some jurisdictional fact which nowhere appears of record. The decree of a court of strictly limited jurisdiction, as, for example, a probate or surrogate's court, often illustrates this difficulty. If the facts do not exist upon which the jurisdiction of such a court is predicated, the decree, although apparently good of record, is a mere nullity. It is held, for example, in Massachusetts, under statutes, that if a probate judge is in fact a creditor of a certain person deceased, he is absolutely disqualified from sitting, and that his decree, determining intestacy or allowing a will, is not merely reversible for error, but is an absolute nullity, although the disqualifying fact nowhere appears of record. In Massachusetts, therefore, and probably in many other States, such a decree gives a purchaser who claims title under it only a title at his own peril, and puts him upon inquiry as to all jurisdictional facts. A striking illustration of this difficulty is seen in a reported case which applied in fact to personal property, but would have

applied in precisely the same way to real estate. A seaman was supposed to have died; his next of kin applied for administration upon his estate; he was adjudged to have died; administration was granted; his administrator demanded payment of a savings bank account, and received payment, and, indeed, could have recovered it from the bank, upon the presumption of death, if the bank had refused to pay it. Afterwards the depositor appeared, and was held to be entitled to the money. The decree of the probate court was a mere nullity, death being essential to its jurisdiction. The emblem of a funeral urn, which appears upon the surrogate's seal in some of our States, is not a mere ornament or formality; it indicates a jurisdictional fact. If, instead of a savings bank deposit, the supposed deceased had owned land, and the land had been sold by an administrator for payment of debts, the alleged intestate, upon appearing, could have recovered the land from a *bona fide* purchaser for value.

15. One may convey his land, or an interest in it, not only by giving a conveyance of it, but by receiving a conveyance of other land. It is familiar law, for example, that the deliberate acceptance of a benefit under a will, with knowledge of the facts, estops the recipient from contradicting or setting up title against the terms of the will, and therefore may operate to estop him from denying the title of another in the recipient's own land. This may be illustrated for the present purpose by an entirely natural supposition. A man of means, upon the marriage of his daughter, decides to give her a certain building-lot near his house, and to put up a house for her on it. He gives her a deed of the land, but circumstances change his plans; he never builds a house, and after a time he forgets that he ever gave her the land. In his will he undertakes to devise the land, as his, to his son, and makes other provision in his will for the daughter. If, now, the daughter, with knowledge of the facts, accepts the provision made for her by the will, her brother becomes to all intents and purposes the owner of her land, as against all the world. His power to make a good title of record is not affected by his lack of a record title, because there is no provision of statute requiring in such case a record title.

The principle which thus operates in the case of a will may operate in the case of conveyance by deed. In Dyer *v.* Sanford,[1] Chief Justice Shaw says,—

[1] 9 Met. 395, at p. 404.

"But we have no doubt that by apt words, even in a deed poll, a grantor may acquire some right in the estate of the grantee. . . . We think a grant may be so made as to create a right in the grantee's land in favor of the grantor. For instance: suppose A has a close, No. 2, lying between two closes, Nos. 1 and 3, of B, and A grants to B the right to lay and maintain a drain from close No. 1, across his close No. 2, thence to be continued through his own close, No. 3, to its outlet; and A, in his grant to B, should reserve the right to enter his drain, for the benefit of his intermediate close, with the right and privilege of having the waste water therefrom pass freely through the grantee's close, No. 3, forever. In effect, this, if accepted, would secure to the grantor a right in the grantee's land. . . . It results from the plain terms of the contract."

In Case *v.* Haight,[1] A, owning the south bank to the bed of the stream, conveyed to B, who owned the north bank and northerly half of the bed up to B's bank, reserving certain dam rights in the river on the land conveyed, and undertook further to "save and reserve" a right to butt a dam on B's bank. It was considered by the court that this provision, either by way of implied covenant or of estoppel, gave to the grantor an easement in the land of the grantee.

A purchaser of land, therefore, examines at his peril, — if not all the unrecorded conveyances to his grantor, as well as by him, at least all the recorded conveyances to his grantor, — in order to see that by the acceptance of some deed of other land his grantor has not lost title to or diminished his title in the land in question.

The foregoing suggestions introduce nothing new. They are brought together here, not for the purpose of instruction, but for the purpose of emphasizing the element, in our so-called "record titles," of facts not appearing on the records of the registry of deeds, and, many of them, appearing nowhere of record.

The question naturally arises, whether the aim of our so-called "record title" system should not be carried out. While it is true that every title is exposed to a thousand possible objections by matters not appearing on the records of the registry of deeds, and appearing nowhere in a convenient and accessible manner, it is equally true that in ninety-nine cases in a hundred these elements, in fact, would, upon inquiry, be settled in favor of the supposed title. The difficulty ordinarily lies, not so much in the

[1] 3 Wendell, 632.

actual risk of loss of title, as in the delay, expense, and inconvenience of making the inquiry, or of risking the title without it. Titles commonly have to be risked, with a very slight inquiry, upon most of these questions, and to that extent we are transferring titles in this country as they are transferred in countries where titles are passed as they were in the days of the ancient Hebrews, by oral transactions made in the presence of the elders. It is only to a limited extent that we have departed from the ancient usage.

The inquiry as to the propriety and practicability of an improvement in these respects resolves itself into three heads: —

1. Can there be a constitutional mode of procedure, by which a given title can, as against all the world and up to a given point, be conclusively adjudicated to be in a given person, subject to given limitations in favor of other given persons?

2. Are there precedents for such an improved procedure, recognizing the principles upon which it would proceed?

3. What is the simplest way of reaching the desired result?

1. The constitutionality of such procedure has been settled beyond question. It has been repeatedly determined within recent years by the courts of last resort of several of the States, and by the Supreme Court of the United States, that a State statute is constitutional which enables one in possession of land, claiming title, to file a petition for quieting and establishing his title against all the world, — against persons outside the State as well as persons within the State. The only essentials to the validity of such procedure are that a fair notice, either by general advertisement or otherwise, and an opportunity to be heard be given; second, that the statute provide either that the decree shall operate directly upon the land, and itself cut off any possible outstanding adverse titles, or that it shall empower some person to give a deed in the name of all possible adverse claimants, releasing their rights. It is only statutes which have failed in these latter respects that have been declared unconstitutional. It is not requisite under such statutes that adverse claimants shall be named or known or identified. They may be described in general terms as the heirs of a given person named, or even as "unknown persons." A large proportion of the States have statutes of this character covering more or less of the whole field of title. In some States the statutes cover practically the whole field. These statutes are frequently resorted to.

2. There is abundant and familiar precedent in all the States for such procedure. The only difficulty with existing procedure is, not that it falls short in principle, but that it lacks completeness. Equity has always recognized proceedings to remove clouds from titles: but in equity procedure there were limitations which rendered the procedure inapplicable in many cases where it was needed. This head of equity jurisdiction has been gradually broadened in many States, and the Supreme Court of the United States holds that extensions of it are cognizable by the equity courts of the United States.

A recent Massachusetts statute of this character provides that an owner of land incumbered by a "possible" condition, restriction, or stipulation, may bring suit against all the world, — naming such defendants as he can, and summoning in others by classes, or as "unknown persons," — to have the validity of such possible condition, restriction, or stipulation determined, and its scope, operation, and effect fixed, by a decree. A recent suit in Massachusetts, under this statute, named some fifty defendants; other persons were permitted to appear as defendants having possible interests, and still other possible defendants, notified by advertisement, as "persons unknown," were theoretically defendants, and were, under the terms of the statute, represented by a person appointed by the court in their interest, at the expense of the petitioner, and were bound by the decree.

All that we need, in order to post our titles up to date, and make them good as against all the world, is to pursue familiar lines of existing law.

In aid and furtherance of a general scheme of title adjudication such as has been outlined above, there should be legislation providing that from and after a judicial settlement of a given title all matters affecting its future course shall, as far as the nature of things will permit, be made to appear of record, and that either the primary record or a duplicate of it should be in the office in which is the record of the establishment of the title. It should also be provided that in case of change of title by death, the probate or surrogate's court shall make a decree, binding upon all parties, as to the facts of heirship or devise, and may free the lands of the deceased from liability for his debts, upon the giving of security, precisely as the personal estate of a person deceased is, by the present rules of law, freed from such liability, upon the giving of an executor's or

administrator's bond. By provisions of this character, invading no one's rights, a title could be kept substantially "posted up to date," so that a transfer of it at any given time could ordinarily be effected by the mere surrender of a certificate of title and the taking out of a new certificate, without delay and with little expense.

To meet the most extreme demands of caution, there might, in every instance, be made, by order of the court, and at the expense of the petitioner for establishment of title, a careful examination of the title, according to the most approved method open at the time, — according to the method which a savings bank, for example, would adopt for a loan on mortgage, or a cautious purchaser for a purchase. This would give all the assurance which any purchaser or lender at present gets in any case. In the second place, there might be imposed, as there is under the Australian system of registration of titles, a very trifling tax, in every case of establishment of title, — perhaps one twentieth of one per cent upon the value of the land, — to go into an insurance fund. The experience of the Australian colonies, the experience of purchasers and investors in this country, and the experience of our title insurance companies, show that a very small insurance fund would cover the few isolated cases of actual loss of title which might possibly occur. At present, statutes which cut off titles upon summary proceedings seldom or never make provision for such examination or for such insurance. When the city of Boston is permitted by statute to take great tracts of land, covered with houses, in the heart of the city, for sanitary purposes, a very brief period is provided within which claimants are to make themselves known and call for payment. Those who do not appear within this period are cut off. The same is true of tax and bankruptcy sales of land, which, as the phrase is, "ransack the title," and in a short time cut off everybody both from claim to the land, and from claim to its proceeds. The legislation of our States is full of examples of the cutting off of possible interests, in a very short period, by mere publication notice. The plan outlined in this article, even without official examination of title, or insurance, would go not one whit beyond the principle of such legislation. Every one, however, would be willing to respect the feelings of the timid, and no one would object to a provision for examination of the title and for insurance indemnity.

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